In the Supreme Court of the United States

W. L. BRUCE, as Administrator of the Estate of John T. Tobin, Deceased, and Catherine Tobin, Petitioners

vs.

WILLIAM TOBIN, Respondent.

PETITION FOR WRIT OF CERTIORARI, AND ARGUMENT IN SUPPORT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners above named respectfully show to this Honorable Court:

First. In November, 1914, John T. Tobin, an adult, unmarried man, was killed through the negligence of his employer, an interstate carrier by rail, under such circumstances as to give rise to liability therefor under what is popularly known as The Federal Employer's Liability Act. The employer voluntarily paid the administrator of the Tobin estate, one Bruce, $4,300.00.

Second. Tobin left surviving him his father and mother, and after the money had been paid to the administrator the father brought an action in equity, in

the Circuit Court of Yankton County, South Dakota, in which he sought to compel the administrator to pay him half of the money received from the employer.

Third. Upon a trial in that Court it was found that the father had suffered no pecuniary loss by the death of the son and his action was dismissed.

Fourth. From this judgment an appeal was taken to the Supreme Court of South Dakota and the judgment of the trial court reversed.

Fifth. The trial court made findings of fact and from them a conclusion of law that the father had suffered no pecuniary loss by the death of the son. The Supreme Court of South Dakota does not reverse the finding of fact but in effect affirms it, dissenting only from the conclusions of law from such fact that the father had sustained no pecuniary loss. The findings of fact are as follows:

I. That W. L. Bruce now is and during all of the times set forth in the Complaint in this action was the administrator of the estate of John T. Tobin, deceased. II. That the Chicago, Milwaukee & St. Paul Railroad Company now is and during all of the times set forth in the Complaint in this action was a railway corporation, and as such corporation was engaged in the business of common carrier between the states of Iowa and South Dakota; that John T. Tobin, deceased, on the 9th day of November, 1914, and for a long time prior thereto was employed by the said Chicago, Milwaukee & St. Paul Ry. Co., while said railway company was engaged in interstate commerce; that said John T. Tobin, deceased, was killed while in the employ of the said railway company on or about the 9th day of November, 1914; that the said John T. Tobin, deceased, did not leave surviving him any widow or any children, and that he died unmarried and without issue; that William Tobin, Sr., the plaintiff in this action, is the father of said John T.

Tobin, deceased, and that Catherine Tobin, one of the defendants herein, is the mother of the said John T. Tobin, deceased. III. That the said John T. Tobin, deceased, at the time he was employed by the said Chicago, Milwaukee & St. Paul Railway Company, was an employee of said corporation under the Act of Congress, approved April 22, 1908, and amended by an Act of April 5, 1910, which Act fixed the liability of common carriers with reference to their employees, while such employees are engaged for the said common carriers and said common carriers are engaged in interstate commerce. IV. That by reason of said Act of April 22, 1908, and Acts amendatory thereof, the laws of the State of South Dakota with reference to the succession of property of persons dying intestate, became suspended, and that the cause of action existing on behalf of the personal representative of said John T. Tobin, deceased, came wholly within and under the regulations of said Act of Congress of April 22, 1908, and laws amendatory thereof, the same being known as Employers' Liability Act. V. That on or about the 14th day of June, 1915, said W. L. Bruce, as the administrator of the estate of John T. Tobin, deceased, entered into a compromise and a settlement with the Chicago, Milwaukee & St. Paul Railway Co., for the wrongful death of said decedent, and that the said railway company at said time paid to said administrator the sum of $4,300.00 in full settlement of said cause of action, and that said administrator at this time holds the said sum of $4,300.00 for the beneficiaries who are entitled to share in same pursuant to law; that William Tobin, Sr., the father of said John T. Tobin, deceased of the age of about seventy-one years; that said John T. Tobin, deceased, at the time of his death, was twenty-four years of age; that the said John T. Tobin, at the time of his death and at all times prior thereto, never contributed to the support of said William Tobin, Sr., his father, and that said William Tobin, Sr., was never dependent on said John T. Tobin, deceased, and that said John T. Tobin, deceased, did not live with his father at the time of his death and at no time gave his father any money or necessaries of life, and that said William Tobin, Sr., at the time of the death of said de-

ceased, supported himself; that said William Tobin, Sr., did not sustain any pecuniary loss because of the death of said decedent. VI. That for a period of about seven years prior to the death of said John T. Tobin, deceased, Catherine Tobin and William Tobin, Sr., lived separate and apart; and during said time William Tobin, Sr., did not contribute towards the support of his wife Catherine Tobin; that in the year 1908, and for a period of ten months thereafter, said deceased gave all his earnings to his mother, Catherine Tobin, and that said time he lived with his mother; that said John T. Tobin, deceased, lived in Yankton, S. Dak., during the year 1908, and that after he left Yankton, and up to the time of his death, he very substantially contributed to his mother's support; that he left Yankton sometime in the year 1909 and that during the greatest portion of the time prior thereto he lived with his mother, Catherine Tobin.

Sixth. The judgment of reversal was entered in the Supreme Court of South Dakota on the 26th day of May, 1917, and the case in which it was entered was entitled William Tobin, Sr., Plaintiff and Appellant, vs. W. L. Bruce, as administrator of the Estate of John T. Tobin, deceased, and Catherine Tobin, Defendants and Respondents, and numbered in said Court 4129.

Your petitioners aver that the construction of the Liability Act by the Supreme Court of South Dakota is erroneous in this:

1. In holding that the facts in the case, as contained in the trial Court's findings compelled a conclusion that the father had sustained a pecuniary loss by the death of his son.

2. In holding that the loss of possible support from such son when the father became indigent, under the provisions of a state statute, was such loss, because,

a. There is no showing that there was any reason-

able probability of the father's ever becoming indigent, or receiving aid.

b. There is no showing of any reasonable probability that the father would ever receive such support under said statute, it not appearing that the deceased son was a resident of the state of South Dakota.

c. Pecuniary loss must be ascertained and measured by the common law, and the scope of the act cannot be extended, or beneficiaries added by state statute.

3. In holding that the father lost pecuniarily by the death of the son, because the son died his debtor in the sum of $100.00.

By reason of the foregoing your petitioners complain that they have been denied a right claimed by them under a statute of the United States, to-wit; an Act of Congress popularly known as the Federal Employers' Liability Act, approved April 22, 1908, and entitled, "An act relating to the liability of common carriers by railroad to their employees in certain cases" and amended by an act approved April 5, 1910, and that in the construction of the said statute of the United States drawn in question by them, the said Supreme Court of South Dakota, in the decision and disposition of said cause erroneously construed said statute and erroneously denied your petitioners' claim thereunder.

In support of this petition there has been filed herewith a certified copy of the record upon which the decision complained of was reached.

WHEREFORE, your petitioners pray respectfully that a Writ of Certiorari, or such other writ as shall be proper in the premises, may be issued out of and under

the seal of this court, directed either to the Supreme Court of the State of South Dakota or to the Circuit Court of the State of South Dakota in and for Yankton County, in either of which the record in said cause may be found, commanding either or both of said courts to send to this court on a day certain, to be in said writ designated, a full, true and complete copy and transcript of the record and proceedings in the said cause above described, the same having been in both of said courts entitled William Tobin, Sr., Plaintiff, vs. W. L. Bruce, as administrator of the Estate of John T. Tobin, deceased, and Catherine Tobin, Defendants, to the end that said cause may be reviewed and determined by this Honorable Court as provided by the Act of Congress approved September 6, 1916, and that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act of Congress, to-wit: H. R. 15158, or appropriate and in conformity with the laws of the United States and the practice of this Honorable Court, and that upon such proceedings the judgment and order of the said Supreme Court of the State of South Dakota in the cause above described may be reversed by this Honorable Court.

And your petitioners will ever pray.

E. A. BURGESS,
B. I. and L. H. SALINGER,
JOSEPH JANOUSEK.
Attorneys for Petitioner.

STATE OF IOWA, }
Woodbury County, } ss.

I, B. I. Salinger, Jr., being first duly sworn, depose

and say, that I have personal knowledge of the matters and things set out in the foregoing petition and that the allegations therein made are true.

B. I. SALINGER,

Subscribed in my presence and sworn to before me by B. I. Salinger, Jr., this 20th day of August, A. D. 1917.

GEO. A. GORDER,
Notary Public in and for said County and State.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION.

I.

No person is entitled to recover before the State Court except such as could have recovered directly in an action against the railway company under the Federal Liability Act.

None of the statutes of South Dakota cited or relied upon by either appellant or the Supreme Court of South Dakota would have been available in the trial of such action. In the distribution of moneys received by an administrator of a deceased employee killed within the terms of the Federal Act, the state statutes of descent and distribution do not govern.

Taylor v. Taylor, 232 U. S., 363;
See, Ry. Co. v. Henry, 158 Ky, 88, 4 NCCA, 495, and cases cited.

II.

There must be plea and proof of pecuniary loss:

In any action under the Federal statute for the negligent death of a deceased employee, the petition must allege that the beneficiaries named suffered a pecuniary

loss from the death. The Federal statute **does not presume** that any of the beneficiaries are dependent upon the decedent and such facts must be **alleged** and **proven.**

Michigan Central Co. v. Vreeland, 227 U. S., 59;
Gulf CFS&S Co. v. McGinnis, 228 U. S., 173;
See, also, Garrett v. Louisville Co., 197 Fed, 715.

III.

The Federal Employers' Liability Act cannot be pieced out or supplemented by state legislation. Since the passage of the Act of 1908, and amendments, that Act is paramount and exclusive and so remains and unless and until Congress shall again remit the subject to the States.

Ried v. Colorado, 187 U. S., 137.

A Federal statute upon a subject exclusively under Federal control must be construed by itself. It cannot be pieced out by state legislation.

Mich. Cent. Ry. Co. v. Vreeland, 227 U. S., 59;
Schreiber v. Sharpless, 110 U. S., 76, 80;
Martin v. Balt. Ry. Co., 151 U. S., 673.

The decisions of the Supreme Court of the United States have expressly refused to permit state statutes to limit the amount of recovery under Federal Employers' Liability Act, holding that state statutes cannot change the exclusive operation and effect of the Employers' Liability Act with which it deals.

See CRI&P Co. v. Devine, 239, U. S., 52.

In Alvarado v. So. Pac., 193 S. W., 1108, the court held that a state statute suspending for insanity the operation of limitations would be inapplicable to the Federal Act, which must be looked to alone.

In Prigg v. Pennsylvania, 16 Pet., 539, 617, 10 L. Ed., 1060, the Court said:

"If Congress have a constitutional power to regulate a particular subject, and they do actually regulate in a given manner and in a certain form, it cannot be that the state legislatures have a right to interfere and, as it were, by way of complement to legislation of Congress to prescribe additional regulations of what they deem auxiliary provisions for the same purpose. In such a case the legislation of Congress in what it does prescribe manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do is as expressive as to what its intention is as the direct provisions made by it."

In Staley v. Illinois Cent. Ry. Co., 268 Ill., 356, LRA, 1916-A, 450, the Court said:

"Whether and in what circumstances railway companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein, are matters in which the nation as a whole are interested, and there are weighty considerations why the controlling law should be uniform and not changed at every state line. **** Only by disturbing the uniformity which the Act is designed to secure, and by parting from the principle which it is intended to enforce, can the several states require carriers to compensate their employees in a different manner than is prescribed by the Federal Act. But no state is at liberty to thus interfere with the operation of a law of Congress."

IV.

In actions under the Federal Employer's Liability Act, the measure of damages sanctioned and approved by the United States Courts control the action of all other courts under the Act.

Nashville Ry. Co. v. Henry, 158 Ky., 88, 4 NCCA, 495;

Seaboard Airline Co. v. DeWall, 225 U. S., 477, 56 L. Ed., 1171;
St. Louis I. M. & S. Ry. Co. v. Taylor, 210 U. S., 281, 52 L. Ed., 1171;
Seaboard Airline Ry. Co. v. Podgett, 236 U. S., 668;
Toledo St. L. & W. Ry. Co. v. Slavin, 236 U. S., 454;
St. Louis S. F. & T. Ry. Co. v. Scale, 229 U. S., 156, 57 L. Ed., 1129;
Mo. Kansas & Tex. Ry. Co. v. Wulff, 226 U. S., 570, Ann. C., 1914-B, 134;
In re Second Liability Cases, 223 U. S., 1; 32 S. Ct. 169; 56 L. Ed. 327.

V.

At common law, a child is not bound to support its parents.

29 Cyc., 1620.

ARGUMENT.

We make it as a premise to our discussion, that the distribution of such a fund as is involved in this case is controlled by precisely the same considerations as would obtain if this were a suit to recover against the employer. The claimant must show himself to be one of the persons intended by the Act of Congress to be compensated. In short, the death of his son must have been a pecuniary loss to him. Just as much as though he were plaintiff here, seeking recovery against the carrier for the death of his son, must he show that there was some reasonable expectation of pecuniary assistance or support, of which he has been deprived, and this loss must be susceptible of a pecuniary valuation.

The facts are not in dispute. This father had never

received any support from the dead son. The record not only fails to show that he had any relations with the son likely to lead to such support, but shows the boy to have been attached to his mother, who was estranged from and lived apart from the father, but shows affirmatively that of what the son could thus devote was given to the support of the mother, who was dependent on him for support—any possibility of this father ever receiving anything from the boy is the purest conjecture. It is too clear for argument, we think, that under facts, generally, the father not only has failed to show a pecuniary loss, but has negatived it.

Indeed if we apprehend the opinion of the Supreme Court of South Dakota, there is nothing in it to the contrary, but the needed element is declared to exist in two peculiar facts in the record—

a—a statute of South Dakota (Sec. 118 Civ. Code) makes it the duty of every child, whether minor or adult, to assist in the support of their indigent aged parents.

b—at his death the son owed the father $100.00.

When Congress passed the act in question it did it with a view to securing uniformity in relief in the class of cases covered by it; such relief as it affords was not unknown nor uncommon, but it varied greatly in the different jurisdictions. It is a truism that to the extent that it operates, it operates to the exclusion of all state statutes or rules. When it was enacted the pecuniary loss which could be sustained by a parent by the death of a child was intended to be measured by this statute, as finally construed by the Supreme Federal Tribunal,

for in no other way could uniformity be secured. When it was passed it was true, as it is now, that by the common law, a child owes no duty to support its parent, and that the right to such support existed only in uncommon statutes like that of South Dakota. If by enacting a statute, the State of South Dakota can make a pecuniary loss arise from a death, where none arose before, it amends the statute to that extent. That is to say, whether the parents suffer a loss by the death of a child, does not depend on the act of Congress but on the residence of the parties. Thus, if an employe, resident in Dakota and having parents there, and an employee living and having parents in Nebraska, are killed side by side, while engaged in interstate commerce in Iowa, the Federal act will warrant recovery by the Dakota parents and deny it to the Nebraska ones. Such a construction defeats what was intended to be accomplished. Recovery will not depend upon what the Federal Tribunal believes to be a sound policy under the statute, but upon what peculiar enactments, each state shall introduce into the field. Pecuniary loss will not mean the same in Iowa as in Dakota.

We cannot see how this can be permitted without leaving the policy of recovery to depend upon the whim of each state, for if the duty to support parents can be imposed by one state others can create other duties, and if this court must recognize this one in this case, it must do so in others, and we shall end where we began.

But even if the loss of what is given by a state statute be a pecuniary loss, within the meaning of the act, surely

Congress intended that it should be certain in its nature, capable of appraisement, and not that mere conjecture should be the basis of liability. Assume that this father may be compensated for what he lost in this respect. Phrase it as definitely as you can, it is that had he lived, and become indigent and the boy lived, and continued able to work, the boy would have been compelled by the laws of South Dakota to **assist** his brothers and sisters in supporting him. What that loss was would depend upon how many brothers and sisters were yet living, what they were earning, and how much their families, if they had any at that time, required for their support —for surely the duty would be measured by others equally sacred and imperative. Nothing appears in this record except that the father was 71; had no accumulation, but was still earning his living and that there were unnumbered brothers and sisters. Can it be possible that a trier of fact could do anything but guess at what this father has lost in this respect.

In another aspect, the record shows him to have lost nothing. The statute did not make it the dead boy's sole duty. When he died, so far as the statute could produce it, he was as well off as ever, because the dead boy's duty was transferred to his surviving brothers and sisters. The boy's death must have removed the possibility of getting what the statute requires, or there is no loss by it and if, by force, of the statute the father is entitled to as much as would have been had he lived, where is the loss. Suppose I had two joint debtors—both solvent—would I sustain a pecuniary loss by the death of one. Is there not a complete analogy?

There is another insuperable objection to the application of the rule of the Supreme Court of South Dakota. Surely the liability for support, the loss of which, is the damage sustained, would be enforceable only against a resident of South Dakota. There is no showing that the boy was such resident. In fact, there is a very strong implication that he is not. He is shown to have "moved from Yankton." Can it be presumed that he remained in Dakota? The letters of administration prove nothing, for they may be granted wherever property of a decedent is found. To apply the rule, this Court must presume that the dead son was a resident of Dakota and would have remained so, until the father should become indigent.

The Supreme Court of South Dakota holds that when this decedent died, owing his father $100.00, the father suffered a pecuniary loss to the extent of the debt. We are at a loss to see how this can be so under this record, at least. If I suffer a pecuniary loss by my debtor's death, it must be because the death removes the **only** means of getting my debt. If a man of great wealth should die my debtor, his death does not deprive me of my debt for I may pursue his estate. All men are presumed to be solvent. One having the burden to show that he has suffered pecuniary loss by the death of his debtor must show, not merely that he is dead, but that he left no estate. This father has failed to show whether the son left any property out of which he might make his debt. He is shown to have an administrator and the extent of the funds in his hands is not shown.

We urge that, under this record, the father has ut-

terly failed to show that he suffered any pecuniary loss by the death of his son, and that, for that reason the trial court was right in holding that he was entitled to no share in a fund intended only for those who did.

Respectfully submitted,

E. A. Burgess

B. J. & L. N. Salinger

Joseph Jamousek

For Petitioner.

BRUCE, ADMINISTRATOR OF TOBIN ET AL., *v.* TOBIN.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 645. Petition for a writ of certiorari submitted October 1, 1917.—Denied October 22, 1917.

The remedy by certiorari which, in certain classes of cases, is substituted by the Act of September 6, 1916, c. 448, 39 Stat. 726, for the remedy by writ of error previously allowed by Rev. Stats., § 709, Jud. Code, § 237, is confined to final judgments, and finality, in the one case as in the other, is determined by the face of the record and the formal character of the judgment rendered by the state court.

In an action by a father to recover a share of a fund collected by his deceased son's administrator as damages under the Employers' Liability Act, the state trial court rejected the father's claim entirely. The state supreme court, upholding his right but not specifically fixing the amount to which he was entitled, directed a new trial to accomplish that result. Assuming the judgment final in the sense that it determined the ultimate right and the general principles by which it was to be measured, *Held*, nevertheless, that it was not final in the sense of the Act of September 6, 1916, *supra*, and that an application for certiorari under that statute was premature.

Petition for a writ of certiorari to review 39 S. Dak. 64, denied.

THE case is stated in the opinion.

Mr. E. A. Burgess, *Mr. B. I. Salinger*, *Mr. L. H. Salinger* and *Mr. Joseph Janousek* for petitioners, in support of the petition. Their printed argument was confined to the merits.

No brief filed for respondent.

Memorandum opinion by MR. CHIEF JUSTICE WHITE, by direction of the court.

A railroad in whose service Tobin lost his life while actually engaged in carrying on interstate commerce, ad-

mitting liability under the Act of Congress, paid the conceded loss to his administrator. A father and mother, but no widow or children survived. The father, the respondent, sued in a state court to recover half the amount as his share of the loss. Setting aside the action of the trial court rejecting the claim, but not specifically fixing the amount of the father's recovery, the Supreme Court of South Dakota directed a new trial to accomplish that result. Application for certiorari was then made by the petitioner on the ground that such decision involved questions under the Employers' Liability Act reviewable by certiorari under the Act of Congress of September 6, 1916, c. 448, 39 Stat. 726.

The act in question, although it deprived of the right of review by writ of error which had hitherto obtained in certain cases and substituted as to such cases the right of petitioning for review by certiorari, subjected this last right to the same limitation as to the finality of the judgment of the state court sought to be reviewed which had prevailed from the beginning under § 709, Rev. Stats., § 237, Judicial Code. Finality, therefore, continues to be an essential for the purposes of the remedy by certiorari conferred by the Act of 1916.

It may be indeed said that although the case was remanded by the court below for a new trial, the action of the court was in a sense final because it determined the ultimate right of the father to recover and the general principles by which that right was to be measured. But that contention is not open as it was settled under § 709, Rev. Stats., § 237, Judicial Code, that the finality contemplated was to be determined by the face of the record and the formal character of the judgment rendered,—a principle which excluded all conception of finality for the purpose of review in a judgment like that below rendered. *Haseltine* v. *Bank*, 183 U. S. 130; *Schlosser* v. *Hemphill*, 198 U. S. 173; *Louisiana Navigation Co.* v. *Oyster Commis-*

sion of Louisiana, 226 U. S. 99; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 418, 419. The reënactment of the requirement of finality in the Act of 1916 was in the nature of things an adoption of the construction on the subject which had prevailed for so long a time.

There being then no final judgment within the contemplation of the Act of 1916, the petition for a writ of certiorari is

Denied.